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14 **UNITED STATES DISTRICT COURT**
15 **SOUTHERN DISTRICT OF CALIFORNIA**

16 UNITED STATES OF AMERICA,

17 Plaintiff,

18 v.

19 JOSE SUSUMO AZANO MATSURA (1),

20 Defendant.

Case No.: 14CR0388-MMA

**UNITED STATES' RESPONSE IN
OPPOSITION TO AZANO'S
MOTIONS TO DISMISS COUNTS 5
THROUGH 24 [112]**

Date: July 17, 2015

Time: 1:30 p.m.

Ctrm: Hon. Michael M. Anello

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I

INTRODUCTION

Azano levies various challenges to the document obstruction counts in violation of 18 U.S.C. § 1519, Counts 5 through 24, contending generally that: (1) the federal government lacks jurisdiction to investigate local election contributions; (2) the statute does not cover falsity created by omissions; (3) the counts related to United States corporation donations are not falsities at all; and (4) the statute is vague. None requires dismissal of the Counts in the Superseding Indictment.

As explained further below, the FBI has jurisdiction to enforce the foreign national contribution provisions of campaign finance laws. Title 2, United States Code section 441e (now codified in Title 52) is not an election-oversight statute. Rather, it is Congress's latest attempt to limit foreign influence in all elections—local, state, and federal—tailored to address harms previously visited by foreign nationals funneling their funds to elected officials. As the Supreme Court has long recognized, that is Congress's role: to define the political community that may participate in elections, which by necessity excludes some (aliens) from those (citizens) who have permanent ties to the United States. Because the FBI has investigative authority over 441e offenses, obstruction efforts tied to such offenses are actionable under section 1519.

Second, Section 1519 is a broad statute, aimed at preventing obstruction of government investigations in many varied ways. The statute covers false entries in

1 records omitting required information, as well as falsified records entirely omitting
2 information. Both Azano—as a part of a “committee” within the meaning of
3 California election law—and the campaigns to which he donated, bore the
4 responsibility of filing records of donations and expenditures under state law.
5 Azano’s calculated effort to conceal and cover up his financial participation in San
6 Diego elections—by failing to record his donations and expenditures—falls squarely
7 within the evils that section 1519 (and section 2(b)) were designed to redress.
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10 Third, a motion to dismiss is not the appropriate vehicle for Azano to raise
11 factual disputes relating to the counts charging him with falsification of records for
12 donations funneled through corporations. He suggests that the donations provided by
13 the corporations were merely that, donations by United States corporations. But
14 crediting the allegations of the Superseding Indictment, as this court must, the
15 corporations were mere conduits or straw donors for Azano, leading to the
16 falsification of campaign finance records that hid the true source of the funds. That is
17 a classic charge under section 1519.
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21 Finally, section 1519 is not unconstitutionally vague as applied to Azano’s
22 conduct. None of the prohibited acts is so abstruse to implicate the Constitution’s Due
23 Process Clause. A person of ordinary intelligence would have fair notice of what the
24 statute prohibits.
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26 The motions to dismiss should be denied in full.
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II

BACKGROUND

A. Overview of Section 1519

Section 1519, colloquially known as the “anti shredding” statute, was enacted in part by the revelation of “massive accounting fraud” at Enron and Arthur Andersen LLP. Yates v. United States, 135 S. Ct. 1074, 1081 (2015). Prior obstruction statutes reached only records destruction or falsification efforts when a person persuaded another to destroy records, but imposed no liability on individuals who shredded or falsified documents himself. Id. The Sarbanes-Oxley Act of 2002, 116 Stat. 745, addressed that gap with the passage of section 1519, which provides

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

18 U.S.C. § 1519.

Although the initial motivation for section 1519 was financial fraud, the legislative history confirms that the statute was intentionally broad. See 148 Cong. Rec. 14,449 (2002) (“Section 1519 is meant to apply broadly[.]”); S. Rep. No. 107-146 at 14 (“Section 1519 is meant to apply broadly[.]”). “The intent of the provision is simple; people should not be destroying, altering, or falsifying documents to obstruct any government function.” S. Rep. 107-146 at 15. That breadth simplifies

1 the proof required for a conviction under section 1519. For example, the statute
2 requires proof only that a person (1) knowingly falsifies a record, (2) with the intent to
3 obstruct or impede or influence the investigation of any matter or in contemplation of
4 such matter and (3) the matter is within the jurisdiction of any department or agency
5 of the United States. Section 1519 does not require a “pending or imminent
6 proceeding or matter” at the time the obstructive conduct is taken. S. Rep. No. 106-
7 146 at 15; see also United States v. Kernell, 667 F.3d 746, 755 (6th Cir. 2012). It
8 requires simply that the obstructive conduct be taken in contemplation of a matter that
9 may occur in the future, with the requisite intent. Nor does Section 1519 require proof
10 of an intent to obstruct a federal investigation specifically. See, e.g., United States v.
11 McQueen, 727 F.3d 1144, 1152 (“There is nothing in the language that says the
12 defendant must also know that any possible investigation is federal in nature.”); id.
13 (“‘Any matter within the jurisdiction’ is merely a jurisdictional element, for which no
14 mens rea is required.”); United States v. Gray, 692 F.3d 514, 519 (2d Cir. 2012)
15 (“[T]he plain language of the statute only requires the Government to prove that [a
16 defendant] intended to obstruct the investigation of any matter that happens to be
17 within the federal government’s jurisdiction.”); United States v. Yielding, 657 F.3d
18 688, 714 (8th Cir. 2011). It requires simply that an obstructive act be taken with the
19 intent to obstruct a matter that happens to fall within the federal government’s
20 jurisdiction. And section 1519 does not require proof of a “nexus” (proof that the
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1 defendant knew his obstructive acts would have the “natural and probable effect” of
2 interfering with an investigation of any matter). Yielding, 657 F.3d at 713.

3 **B. Superseding Indictment Counts 5 Through 24**

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5 As it relates to this motion, the Superseding Indictment alleges the following:

6 Jose Susumo Azano Matsura is a citizen of Mexico, who had never applied for,
7 nor obtained, legal permanent resident status in the United States. As a result, Azano
8 is a “foreign national” for the purposes of 2 U.S.C. § 441e,¹ prohibited from making
9 donations and contributions in support of any candidate for elective office. See
10 Superseding Indictment [42] ¶ 4.
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13 Notwithstanding that prohibition, Azano participated in San Diego area
14 elections in 2011, 2012 and 2013 in violation of federal law. Azano designed secret
15 methods to finance candidates’ campaigns with his coconspirators because he could
16 not openly contribute as a foreign national. Id. ¶ 21d. The methods ranged from
17 using conduits (or “straw donors”) to donate to campaigns, political parties and
18 independent expenditure committees, with Azano reimbursing the conduits for their
19 donations later, id. ¶ 21e, f; to creating an independent expenditure committee and
20 funding it with money from a company he owns, id. ¶ 21g; to funding in-kind
21 donations of social media services to campaigns, id. ¶¶ 22h, i, j. Though the methods
22 varied, the aim remained the same: funnel Azano’s own illicit funds to candidates of
23 his choosing.
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28 ¹ The statute is now codified at 52 U.S.C. § 30121.

1 Campaign donations are recorded by law. The Federal Election Commission
2 maintains records of federal campaign contributions; the State of California maintains
3 records of donations to political committees; and the City of San Diego maintains
4 records of donations to campaigns and independent expenditure committees, as well
5 as records of expenditures made by independent expenditure committees. Id. ¶¶ 16-
6 17. Azano's efforts to conceal and cover up the source of his donations and
7 contributions resulted in false entries in and falsified campaign records. For example,
8 Azano caused the submission of falsified campaign contribution envelopes to a
9 mayoral candidate in December 2011 and January 2012, purporting to contain
10 donations from others when the donations were, in fact, coming from Azano. Id.
11 ¶¶ 22b; 31(5)-31(18). Those documents attempted to conceal and cover up the fact
12 that the donors all submitted funds for Azano's benefit, with the guarantee of
13 reimbursement by him. But the documents omitted any reference to Azano at all.
14 That, in turn, caused the submission of a false entry into the San Diego City Clerk's
15 Record of Donations regarding the true source of the funds.
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17 Similarly, Azano caused the submission of campaign checks identifying others
18 as putative donors—varying from an individual, Mark Chase, to companies, South
19 Beach Acquisitions and West Coast Acquisitions, and even a company he owned,
20 AirsamN492RM, LLC—when the funds were, in fact, Azano's own (illegal) funds.
21 Id. ¶¶ 22o-t; 31(20)-(23). That caused false entries in and falsified campaign records,
22 as well.
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1 Finally, Azano and his co-conspirator, Ravneet Singh, hid the funding source
2 (Azano) for social media work conducted on behalf of the campaigns, knowing that
3 the campaigns could not accept in-kind donations from foreign nationals. As a result,
4 they caused false entries to be made in campaign records, which now omitted the
5 hundreds of thousands of dollars of work completed at Azano's behest. Id. ¶¶ 22g-i,
6 u-z; 31(19), (24).
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8 Although Azano attempted to conceal and cover up his donations, the Federal
9 Bureau of Investigation ("FBI") uncovered the origin of Azano's campaign donations.
10 The FBI is responsible for investigating the potential influence of foreign money in
11 federal, state and local elections, as well as unlawful conduit contributions in federal
12 elections. 2 U.S.C. §§ 441e, 441f; see also Superseding Indictment ¶ 18.
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14 As a result, Azano and others were charged in Counts 5 to 24 of the
15 Superseding Indictment with offenses in violation of 18 U.S.C. § 1519. The
16 Superseding Indictment charges that Azano and his coconspirators "did knowingly
17 alter, conceal, cover up, falsify and make a false entry into a record and document
18 with the intent to impede, obstruct and influence the investigation and proper
19 administration of matters within the jurisdiction of the [FBI] – to wit, by concealing
20 and covering up, in records specified below, the fact that [Azano] was the true source
21 of the following campaign donations and contributions":
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- Counts 5-18: false entries caused in the San Diego City Clerk's Record of Donations for mayoral candidate 1, hiding Azano as the source of conduit contributions made through co-conspirator Marc Chase, id. ¶¶ 22a-c;
- Counts 19, 24: false entries caused in the San Diego City Clerk's Record of Donations for mayoral candidates 1 and 3, hiding Azano as the donor financing in-kind donations for social media work, id. ¶¶ 22g-i, u-z;
- Count 20: a false entry caused in the San Diego City Clerk's Record of Independent Expenditure Committees supporting candidate 1, hiding Azano as the source of conduit contributions made through his company Airsam N492RM, LLC, id. ¶¶ 22d-f;
- Count 21: a false entry caused in the Federal Election Commission's Record of Donations, hiding Azano as the source of conduit contributions made through co-conspirator Marc Chase, id. ¶ 22o;
- Counts 22 and 23: false entries caused in campaign records hiding Azano as the source of conduit contributions made through co-conspirator Marc Chase and his companies, West Coast Acquisitions, and South Beach Acquisitions, id. ¶ 22p-t.

Based in part on the above conduct, Azano was also charged in Count 1 with a conspiracy to commit section 1519 offenses, as well.

III

ARGUMENT

A. Foreign National Contributions Made In Connection With Local, State and Federal Elections Are Matters Within the Jurisdiction of the FBI

Azano asserts that the federal government lacks jurisdiction over local election matters, divesting the § 1519 counts of a jurisdictional basis for prosecution.² See Mot. [112] at 9-22. In support of his contention, Azano refers to various law review articles and cases suggesting that states reserve the right generally to oversee their election processes. While that may be true, 2 U.S.C. § 441e (now 52 U.S.C. § 30121) is not an election-oversight statute. It does not regulate how local elections are conducted; it does not prescribe when or where local elections must take place; it does not identify who, among citizens, may vote in local elections. Instead, it simply limits financial participation in American elections to those with permanent, lasting ties to the United States: citizens and lawful permanent residents. That is a “compelling interest” that the Supreme Court has blessed as an appropriate and necessary part of the process of self-governance:

It is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government. It follows, therefore, that the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American self-government, and in thereby preventing foreign influence over the U.S. political process.

² Even under Azano’s theory, then, Count 21, charging falsification of records in connection with a federal election would survive.

1 Bluman v. Fed. Election Comm’n, 800 F. Supp. 2d 281, 288 (D.D.C. 2011) (three
2 judge court), aff’d 132 S.Ct. 1087 (2012). It follows, then, that section 441e (and the
3 FBI’s investigation of violations of section 441e) are matters within the jurisdiction of
4 a United States’ department and agency.³

6 As the court in Bluman noted, and as the Supreme Court has long recognized,
7 “[s]elf-government . . . begins by defining the scope of the community of the
8 governed and thus of the governors as well.” Cabell v. Chavez-Salido, 454 U.S. 432,
9 439 (1981). “[T]he distinction between citizens and aliens, though ordinarily
10 irrelevant to private activity, is fundamental to the definition and government of a
11 state.” Ambach v. Norwick, 441 U.S. 68 (1979). That process of political self
12 definition, by its nature, requires the exclusion of those who are not United States
13 citizens. The “exclusion of aliens from basic governmental processes is not a
14 deficiency in the democratic system, but a necessary consequence of the community’s
15 process of political self definition.” Cabell, 454 U.S. at 439 (quoted in Bluman, 800
16 F. Supp. 2d at 288).

17 This is particularly true given that “Congress, as an aspect of its broad power
18 over immigration and naturalization, enjoys rights to distinguish among aliens that are
19 not shared by the States.” Nyquist v. Mauclet, 432 U.S. 1, 7 n.8 (1977). Any “policy
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25 ³ The Supreme Court’s summary affirmance of that “compelling interest” is
26 binding on this court. Bluman v. Fed. Election Comm’n, 132 S.Ct. 1087 (2012);
27 United States v. Blaine Cty., Montana, 363 F.3d 897, 904 (9th Cir. 2004); Seminole
28 Tribe v. Florida, 517 U.S. 44, 67 (1996) (“When an opinion issues for the Court, it is
not only the result, but also those portions of the opinion necessary to that result by
which we are bound.”).

1 toward aliens is vitally and intricately interwoven with . . . foreign relations and the
2 war power” but also “the maintenance of a republican form of government” at home.
3 Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952). Congress may therefore
4 further its compelling interest in protecting American democracy from foreign
5 infiltration at all levels of government. Cf. U.S. Const. Art. IV, § 4 (Republican Form
6 of Government Clause).
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9 As a result, while “foreign citizens in the United States enjoy many of the same
10 constitutional rights that U.S. citizens do,” they may be denied certain rights and
11 privileges when democratic self-governance is at stake. 800 F. Supp. 2d at 286-87.
12 “For example, the Supreme Court has ruled that the government may bar aliens from
13 voting, serving as jurors, working as police or probation officers, or teaching at public
14 schools,” all activities that form part of the democratic self definition process. Id. at
15 283; see also id. at 287 (collecting Supreme Court cases). Those Supreme Court cases
16 “draw[] a fairly clear line: the government may exclude foreign citizens from
17 activities ‘intimately related to the process of democratic self-government.’” Id. at
18 287. A “State’s historical power to exclude aliens from participation in democratic
19 political institutions [is] part of the sovereign’s obligation to preserve the basic
20 conception of political community.” Id. (quoting Foley v. Connelie, 435 U.S. 291
21 (1978) (upholding law barring foreign citizens from serving as police officers)); see
22 also id. (“[T]he government may reserve participation in its democratic political
23 institutions for citizens of this country.”); Foley, 435 U.S. at 297 (“[A]lthough we
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1 extend to aliens the right to education and public welfare, along with the ability to
2 earn a livelihood and engage in licensed professions, the right to govern is reserved to
3 citizens.”).

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5 Political contributions and express advocacy expenditures are part of the
6 process of democratic self-government that may be limited to citizens. 800 F. Supp.
7 2d at 288. Because the Supreme Court “has deemed activities of democratic self-
8 government to include functions as unrelated to the electoral process as teaching in
9 public schools and serving as police and probation officers,” it follows that “spending
10 money to influence voters and finance campaigns is at least as (and probably far more)
11 closely related to democratic self-government.” Id.

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14 Section 441e is the latest in a long line of Congressional efforts to “define” the
15 scope of the community that may legitimately try to sway elections in the United
16 States. In 1935, a congressional investigation found that the Nazi party of Germany
17 and other foreign organizations had paid for propaganda disseminated by “a large
18 number of aliens who, although they had resided in this country for a number of years,
19 had never made an effort . . . to become citizens.” H.R. Rep. No. 153, 74th Cong., 1st
20 Sess. 7 (1935). In response, Congress enacted the Foreign Agents Registration Act of
21 1938 (“FARA”) to “identify agents of foreign principals who might engage in
22 subversive acts or in spreading foreign propaganda, and to require them to make
23 public record of the nature of their employment.” Viereck v. United States, 318 U.S.
24 236, 241 (1943). FARA required each agent of a foreign principal to register with the
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1 government and disclose certain information, including the principal's identity and the
2 contractual terms of the agent's representation. FARA § 2.

3 FARA, however, did not limit the amounts that agents could spend to achieve
4 their foreign principals' goals. In the early 1960s, an extensive series of hearings
5 explored the effects of such spending. See Activities of Nondiplomatic
6 Representatives of Foreign Principals in the United States: Hearings Before the S.
7 Comm. On Foreign Relations, 88th Cong., 1st Sess. (1963). Agents of foreign
8 principals testified regarding their efforts to induce policy decisions favorable to
9 foreign governments and businesses, including by funneling contributions from
10 foreign principals to Members of Congress. For example, the Philippine sugar
11 industry, which had an interest in the United States government's allocation of federal
12 sugar import quotas, contributed through the industry's registered agent to the
13 campaigns of 20 members of Congress. Id. at 195-212. In 1966, Congress therefore
14 amended FARA to prohibit any person acting under the direction and control of a
15 foreign principal from "knowingly making any contribution 'in connection with an
16 election to any political office.'" 18 U.S.C. § 613 (1970).

17 Even as amended, FARA did not prohibit foreign principals from making
18 contributions directly rather than through agents. During the Watergate investigation,
19 allegations surfaced that the Nixon campaign had received contributions from citizens
20 of foreign countries. One such contribution investigated by the Watergate special
21 prosecutor was made by a Greek industrialist soon after his firm was awarded a
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1 contract to supply fuel to the U.S. Sixth Fleet. See Seth Kantor, Jaworski Eyes
2 Probing Foreign '72 Gifts, Wash. Post, Jan. 25, 1974, at A9.

3 Congress sought to limit such contributions when it enacted the Federal
4 Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101(d), 88 Stat.
5 1267. That law expanded FARA's prohibition on campaign contributions by agents
6 of foreign principals to encompass contributions by any "foreign national," in other
7 words, any person who was not a United States citizen or lawful permanent resident.
8 That extension, however, proved ineffective in limiting foreign national contributions
9 through a "soft money loophole." Those foreign nationals donated to political parties
10 to finance activity at the state and local level, and gained unprecedented access to
11 political leaders at the federal and state levels.

12 The controversy generated by reports of such fundraising led to a Senate
13 Committee investigation on "foreign contributions and their effect on the American
14 political system." S. Rep. No. 167, 105th Cong., 2d Sess 11 (1998) ("Thompson
15 Committee Report"). The Thompson Committee Report was nearly 10,000 pages
16 long, and cataloged numerous instances of foreign nationals gaining access to political
17 leaders through campaign contributions and donations. For example, the investigation
18 revealed efforts by agents of the Chinese government to devise "a seeding strategy of
19 developing viable candidates sympathetic to the [People's Republic of China] for
20 future federal elections . . . and financing American elections through covert means."
21 Id. at 47, 2501-2512. Those efforts included not only federal elections, but "state
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1 elections as well.” Id. at 2509. The Report identified a foreign national, who donated
2 \$100,000 to the elected state treasurer of California, who had responsibility for
3 investment of billions of dollars in pension assets. Id. at 971-972, 5576-5581, 5584.
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5 As a result of the Thompson Committee Report findings, Congress passed the
6 current version of section 441e in 2002, which makes it unlawful for a “foreign
7 national, directly or indirectly, to make”
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- 9 • A contribution or donation in connection with a federal, state, or local
10 election, 2 U.S.C. § 441e(a)(1)(A);
11 • A contribution or donation to a committee of a political party, id.
12 § 441e(a)(1)(B); or
13 • An expenditure, independent expenditure or disbursement for an
14 electioneering communication, 2 U.S.C. § 441e(a)(1)(C).
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17 Section 441e is narrowly tailored to address the “compelling interest of limiting
18 participation of non-Americans in the activities of democratic self-government”—
19 whether at the local, state or federal level—and a proper exercise of Congressional
20 authority.⁴
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22 None of the cases Azano cites disturbs that conclusion. See Mot. at 10-22. The
23 referenced cases touch on Congressional authority to impose federal regulations on
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25 ⁴ As explained further in the response to Azano’s Motion to Dismiss Counts 1
26 and 3 on constitutional grounds [107], section 441e is also not unlawful to the extent it
27 prohibits contributions beyond those that create the danger of quid pro quo
28 arrangements. See Mot. [112] at 20-21; Bluman, 800 F. Supp. 2d at 289 (“the
majority opinion in Citizens United is entirely consistent with a ban on foreign
contributions and expenditures”).

1 state elections, as they relate to citizens—and have nothing to do with Congress’s
2 plenary authority to preserve a Republican form of government, oversee foreign
3 relations, and set laws related to immigration by limiting foreign national influence in
4 campaigns. Oregon v. Mitchell, cited by Azano, for example, decided only whether
5 the federal government could require states to accept votes from “18-year-old citizens
6 in state and local elections.” 400 U.S. 112, 112 (1970) (emphasis added). Pope v.
7 Williams, 193 U.S. 621, 632 (1904), decided whether a citizen of the United States
8 had a constitutional right to vote in a state election, even though he had failed to
9 comply with registration requirements under state law. United States v. Reese decided
10 whether a general federal statute could be used to criminally charge inspectors of a
11 municipal election who refused to count the vote of “a citizen of the United States of
12 African descent.” 92 U.S. 214, 215 (1876) (emphasis added).⁵ Minor v. Happersett
13 concluded that all women could be denied the right to vote in state elections, even
14 though they were citizens of the United States. 88 U.S. (21 Wall.) 162, 177 (1874).
15 And Dred Scott was not a decision about voting at all, but whether the Missouri
16 Compromise was lawful and whether a slave was a citizen permitted to sue in federal
17 court at all. 60 U.S. (19 How.) 393, 405 (1856). Putting aside the ignominy of those
18 cited cases, none forbids Congress from excluding aliens from the democratic
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25 ⁵ And in Reese, the Supreme Court decided solely on statutory grounds that the
26 conduct charged was not covered, not that the statute was an unconstitutional exercise
27 of Congress’s power. As the Court concluded, “Congress has not as yet provided by
28 ‘appropriate legislation’ for the punishment of the offence charged in the indictment.”
Reese, 92 U.S. at 221.

1 processes of self-governance in the United States by limiting their financial
2 contributions in local, state or federal elections.

3 It does not matter that some local jurisdictions may permit aliens to vote. Even
4 if some jurisdictions permit non-citizens to vote, see Mot. [112] at 14-17, that is a
5 matter of grace, not constitutional requirement. Sugarman v. Dougall, 413 U.S. 634,
6 649 (1973) (holding that “citizenship is a permissible criterion” in limiting voting
7 rights). Moreover, Congress’s measured response to the Thompson Committee
8 Report by addressing the pressing harms—foreign money that could buy influence in
9 American politics—does not somehow divest Congress of the authority to act simply
10 because it did not go further in denying all aliens the right to vote at all. Cf. Buckley
11 v. Valeo, 424 U.S. 1, 105 (1976) (Congress may “take one step at a time, addressing
12 itself to the phase of the problem which seems most acute to the legislative mind”). In
13 any event, aliens’ ability to vote in primary school board elections in Arlington,
14 Virginia, for example, has no bearing here. Azano does not claim to vote in San
15 Diego local, California state, or federal elections. See Mot. [112] at 14. Thus no
16 disconnect between voting and contribution rights is presented here.

17 Section 441e is a valid exercise of Congressional power to ensure foreign
18 money does not buy influence from any elected official or influence the outcome of an
19 election in the United States. Any record keeping violation knowingly committed in
20 contemplation of any matter within FBI’s jurisdiction (like a section 441e
21 investigation), with the intent to impede, obstruct, or influence such a matter is
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properly the subject of an 18 U.S.C. § 1519 offense.⁶ See Yates v. United States, 135 S. Ct. 1074, 1083 (2015) (Section “1519 is a penal provision” covering “federal investigations or proceedings of every kind, including those not yet begun.”); id. at 1085 n.5 (noting that the Senate Committee Report explained that “the intent of the provision is simple; people should not be destroying, altering or falsifying documents to obstruct any government function”).

B. Sections 1519 and 2b Cover the Conduct Alleged in Counts 19 and 24

Azano next moves to dismiss Counts 19 and 24 for failure to state an offense. The allegations in the indictment must be accepted as truth in analyzing whether a cognizable offense has been charged when challenged under Federal Rule of Criminal Procedure 12. United States v. Boren, 278 F.3d 911, 914 (9th Cir. 2002). The four corners of the indictment serve as the basis for evaluating the sufficiency of an indictment, and a “motion to dismiss the indictment cannot be used as a device for a summary trial of the evidence.” Id. (internal citation omitted). Thus, motions to dismiss cannot be used to determine “general issues of guilt or innocence.” Id.

An indictment need contain only a “plain, concise and definite written statement of the essential facts constituting the offense charged[.]” Fed. R. Crim. P. 7(c)(1). As a result, it is often acceptable for an indictment to set forth the offense

⁶ Thus, the FBI is in a different position than the Department of Labor as described in United States v. Facchini, 874 F.2d 638 (9th Cir. 1989). See Mot. [112] at 20-21. While the federal government was not “empowered to act on the fraudulent claims of applicants for state unemployment benefits” there by statute, the FBI here is charged with enforcing section 441e and therefore “empowered to act” on the fraudulent records Azano created and caused to be created.

1 in the language of the statute itself, “as long as those words of themselves fully,
2 directly, and expressly, without any uncertainty or ambiguity, set forth all the
3 elements necessary to constitute the offence intended to be punished.” Hamling v.
4 United States, 418 U.S. 87, 118 (1974). The indictment must contain a “statement of
5 the facts and circumstances as will inform the accused of the specific offence, coming
6 under the general description, with which he is charged.” Id.

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9 Counts 19 and 24 state a claim under § 1519. The Superseding Indictment
10 charges that Azano and his coconspirators “did knowingly alter, conceal, cover up,
11 falsify and make a false entry into a record and document with the intent to impede,
12 obstruct and influence the investigation and proper administration of matters within
13 the jurisdiction of the [FBI] – to wit, by concealing and covering up, in records
14 specified below, the fact that [Azano] was the true source of the following campaign
15 donations and contributions.” For Count 19, that was causing the creation and
16 submission of a San Diego City Clerk’s office record that omitted any reference to
17 \$128,000 in in-kind services provided by Singh as financed by Azano. For Count 24,
18 that was causing the creation and submission of a San Diego City Clerk’s office
19 record that omitted any reference to \$191,950 in in-kind services provided by Singh as
20 financed by Azano.

21
22 Under section 1519, that is sufficient to state a claim. Azano nonetheless
23 claims that the omission of his donations from the campaign records cannot support a
24 § 1519 prosecution because omissions are not actionable because he “had no duty to
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1 report the donations.” Mot. [112] at 23. But that is not true. Under California law,
2 any person or group of person who donate or independently expend more than
3 \$10,000 on behalf of a candidate is considered a “committee.” See San Diego
4 Municipal Election Campaign Control Ordinance (“SDMECCO”) § 27.2903; Cal.
5 Gov. Code § 82013. “Committees” are required to disclose contributions and
6 expenditures made in connection with an election. Cal. Gov. Code § 84203.5;
7 SDMECCO § 27.2930. Those contributions must be reported on California Form 465
8 or Form 496, depending on the time of the contribution or expenditure. Id.

11 The value of the contributions (whether seen as a donation or independent
12 expenditure) alleged in the Superseding Indictment (\$128,000 in February 2012 for
13 Count 19 and \$191,950 in November 2012 for Count 24) renders Azano a
14 “committee” within the meaning of San Diego and California election law. See San
15 Diego Municipal Election Campaign Control Ordinance § 27.2903; Cal. Gov. Code
16 § 82013. Accordingly, Azano was subject to a reporting duty. By Azano’s own
17 account, such a duty renders the omissions actionable under section 1519. See Mot.
18 [112] at 23 (“A non-disclosure can only serve as a basis for a fraudulent scheme when
19 there exists an independent duty that has been breached by the person so charged.”);
20 see also United States v. Norman, 2015 WL 737649, *4-6 (E.D. Pa. Feb. 23, 2015)
21 (collecting cases and concluding that “an omission can indeed constitute a violation of
22 § 1519”); United States v. Taohim, 529 Fed. App’x 969, 974 (11th Cir. 2013)
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1 (describing omission of information from a record book that served as basis for §
2 1519 prosecution).

3 Even if Azano had no independent duty to report his donations and
4 expenditures,⁷ Azano ignores the import of section 2(b) liability. By his actions,
5 Azano willfully caused the campaign to make and submit falsified campaign records
6 (or make records containing false entries). Under well-established law regarding
7 section 2(b) liability (“whoever willfully causes an act to be done which if directly
8 performed by him or another would be an offense against the United States, is
9 punishable as a principal”), Azano is liable for the omission’s he willfully caused from
10 the campaigns’ disclosures. 18 U.S.C. § 2(b).

14 Azano does not (and on the face of the indictment cannot) dispute that
15 donations to campaigns “had to be reported to government agencies, which
16 maintained records that the public and law enforcement agencies could access.”
17 Superseding Indictment ¶ 16. That is the prevailing law. Campaigns themselves are
18 required to submit donation records under San Diego law. See Superseding
19 Indictment ¶ 16; see also San Diego Municipal Code §§ 27.2930, 27.2931 (requiring
20 disclosure of campaign contributions, which include, among other things, the
21 “forgiveness of a debt or other obligation to pay for goods or services rendered, or
22 reduction of the amount of the debt or other obligation to pay for goods or services

26 ⁷ Courts have premised § 1519 liability on defendants who have no duty to create
27 or retain records at all. See, e.g., United States v. Kernell, 667 F.3d 746, 756 (6th Cir.
28 2012) (“In addition, courts have imposed liability under § 1519 on defendants who
clearly had no legal obligation to create or maintain the records at issue.”).

rendered”). The campaign records submitted in this case were false: they omitted the in-kind donations financed by Azano. If Azano himself had submitted the campaign records that are the subject of Counts 19 and 24, he would have knowingly created and submitted a falsified record because the record did not contain entries about the money he had donated, a § 1519 offense. Azano does not evade criminal culpability by causing the campaign instead to submit the falsified record. See, e.g., United States v. Fairchild, 990 F.2d 1139, 1141 (9th Cir. 1993) (though defendant did not make false statements himself or direct anyone to make false statements, he could be held liable under 18 U.S.C. § 2(b) because of actions that caused false statements to be made to the government); United States v. Causey, 835 F.3d 1289 (9th Cir. 1987) (tax preparer may be held liable under § 2 for making a false tax claim when he causes another to file the tax claim); United States v. Rowland, 2014 WL 3341690 (D. Conn. July 8, 2014) (explaining section 2b liability for false statements made by a candidate to the Federal Election Commission, which were caused by the defendant, a political consultant, who attempted to conceal his efforts in the campaign); cf. United States v. Kanchanaluk, 192 F.3d 1097, 1042 (D.C. Cir. 1999) (“By thus causing political committees to report conduits instead of the true sources of donations, defendants have caused false statements to be made to a government agency.”). Because Azano willfully caused the campaign to falsify a record of campaign donations (by concealing and covering up his funding of Singh’s work), he “is punishable as a principal for the offense.” 18 U.S.C. § 2(b).

1 These conclusions are not a result of any “ever-expanding theory of criminal
2 liability under section 1519,” but a result of the plain text of the statute and well-
3 established law regarding § 2(b) liability as a principal. Mot. [112] at 24. Because the
4 conduct alleged in Counts 19 and 24 falls squarely within the prohibition of
5 “falsifying” or “making a false entry” in a record to “conceal” and “cover up”
6 conduct, and willfully causing such acts, 18 U.S.C. § 1519 and § 2(b), the motion to
7 dismiss Counts 19 and 24 should be denied.
8
9

10 **C/D. Azano’s Challenge to Counts 20, 22 and 23 are Factual Defenses**
11 **That Are Not Appropriate for a Motion to Dismiss**

12 Azano contends that Counts 20, 22, and 23 should be dismissed because a
13 donation by a United States corporation violates no laws, and the company identified
14 as the donor in the challenged counts are each United States corporations. Mot. [112]
15 at 24-27. That ignores, however, the language of the Superseding Indictment,
16 charging Azano with “concealing and covering up . . . the fact that [Azano] was the
17 true source of the . . . campaign donations and contributions,” not the United States
18 companies. See Superseding Indictment ¶ 20. The companies, therefore, were
19 nothing more than “straw donors” acting at Azano’s behest. Though Azano now
20 refutes that allegation, an indictment is not defective simply because the facts alleged
21 are disputed; rather, the facts alleged must be presumed to be true. Boren, 278 F.3d at
22 914; see also United States v. Sisson, 399 U.S. 267, 288 (1970) (a question of
23 evidence is not a question about the sufficiency of the indictment); Rowland, 2014
24 WL 3341690 at *6 (where campaign consultant was charged with false statements in a
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1 campaign document designed to hide his role in the campaign, claim that the
2 document contained no false statement was a defense for trial, not a basis to attack the
3 indictment). Because the Superseding Indictment alleges that Azano was the true
4 donor, not any United States corporation, he caused (with the requisite intent) the
5 campaigns to make false records identifying a false donor. That is sufficient to state a
6 claim under § 1519.
7

8 **E. Section 1519 is not Unconstitutionally Vague**

9
10 Azano does not clearly identify what he complains is unconstitutionally vague
11 in section 1519, but appears to raise three separate concerns: (1) the phrase “in
12 relation to or contemplation of such matter or case” is unclear; (2) the statute is vague
13 as applied to claims relating to omissions in campaign records; and (3) that the statute
14 is unclear to the extent it covers records regarding donations by United States
15 corporations. Mot. [112] at 27-29.
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17

18 The Fifth Amendment's Due Process Clause protects against criminal
19 convictions based on impermissibly vague statutes. Holder v. Humanitarian Law
20 Project, 561 U.S. 1, 18-19 (2010). ““A conviction fails to comport with due process if
21 the statute under which it is obtained fails to provide a person of ordinary intelligence
22 fair notice of what is prohibited, or is so standardless that it authorizes or encourages
23 seriously discriminatory enforcement.”” Id. (quoting United States v. Williams, 553
24 U.S. 285, 304 (2008)). A person whose conduct is clearly proscribed by a statute
25 cannot, however, complain that the law is vague as applied to the conduct of others.
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1 Id. at 2719 (quoting Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489,
2 495 (1982)).

3 Courts have routinely rejected vagueness challenges to the phrase “in
4 contemplation of” in section 1519. For example, the court explained in United States
5 v. Kernell, that

7 Courts considering the question have consistently held that the belief that
8 a federal investigation directed at the defendant's conduct might begin at
9 some point in the future satisfies the “in contemplation” prong. We
10 articulated this principle clearly in United States v. Lanham, 617 F.3d
11 873 (6th Cir.2010). In Lanham, corrections officers intentionally placed
12 an 18-year-old who had been arrested for speeding and eluding police in
13 the general population cell as a punishment for attempting to assault a
14 friend of the officers. Lanham, 617 F.3d at 879–80. When the young man
15 was later sexually assaulted by inmates, the officers signed a statement
16 that he was placed in general population because of the need to
17 decontaminate available “detox” cells. Id. at 881. After being convicted
18 under § 1519, the officers argued on appeal that they did not make their
19 false statement “in contemplation” of an investigation because no
20 investigation had begun at the time. Id. at 887. The Court affirmed the
21 conviction, stating that “the falsification was presumably done in
22 contemplation of an investigation that might occur.” Id.

23 While this interpretation makes “in contemplation” under § 1519 very
24 broad, it is consistent with the legislative history and other cases to
25 consider the question. See Jho, 465 F.Supp.2d at 636 (“[I]mposing a
26 requirement that the matter develop into a formal investigation ignores
27 the plain meaning of the statute and the legislative history.”); see also
28 United States v. Ionia Mgmt., S.A., 526 F.Supp.2d 319, 329
(D.Conn.2007) (“In comparison to other obstruction statutes, § 1519 by
its terms does not require the defendant to be aware of a federal
proceeding, or even that a proceeding be pending.”).

667 F.3d 746, 755 (6th Cir. 2012); see also United States v. Moyer, 674 F.3d 192, 212
(3d Cir. 2012) (“in contemplation” clause not vague, though it “makes criminal

1 liability very broad under § 1519,” this “is consistent with the legislative history and
2 other cases to consider the question”).

3 The scienter requirement of § 1519 mitigates the breadth of the “in
4 contemplation” clause as well. See Vill. of Hoffman Estates v. Flipside, Hoffman
5 Estates, Inc., 455 U.S. 489, 499 & n.14 (1982) (noting that “the Court has recognized
6 that a scienter requirement may mitigate a law's vagueness, especially with respect to
7 the adequacy of notice to the complainant that his conduct is proscribed,” and
8 collecting cases). Specifically, it requires that the individual commit the omission
9 “knowingly” and “with the intent to impede, obstruct, or influence” any matter that is
10 within the jurisdiction of any department or agency of the United States. 18 U.S.C.
11 § 1519. Accordingly, the statute does not criminalize innocent or inadvertent conduct,
12 as suggested by the defendant. See also United States v. Yielding, 657 F.3d 688, 711
13 (8th Cir. 2011) (“[Section 1519] does not impose liability ... without an intent to
14 impede, obstruct, or influence a matter. If it did, then the statute would forbid
15 innocent conduct such as routine destruction of documents that a person consciously
16 and in good faith determines are irrelevant to a foreseeable federal matter.”).

17 The whole point of Azano’s scheme was to evade detection for financing
18 campaigns by concealing and covering up his monetary trail from authorities. As
19 such, he cannot complain that he had no knowledge that his efforts to conceal that trail
20 would result in an investigation. Thus, to the extent there are any ambiguities in the
21 “contemplation” prong, Azano may not raise or rely on them. See Humanitarian Law

1 Project, 130 S.Ct. at 2720; Kernell, 667 F.3d at 752 (vagueness challenge to
2 contemplation prong not available to defendant who obviously knew that investigation
3 would result).

4
5 Nor is section 1519 vague for covering omissions in the false campaign records
6 submitted. As the district court noted in Norman,

7 the language of § 1519 gives a “person of ordinary intelligence a
8 reasonable opportunity” to anticipate that knowingly making an omission
9 with the intent to impede the investigation of a matter under federal
10 jurisdiction is criminal conduct under the statute. Section 1519 describes
11 a broad range of conduct—“alters, destroys, mutilates, conceals, covers
12 up, falsifies, or makes a false entry”—which as a whole, creates the clear
13 impression that the statute is concerned with any intentionally deceptive
14 behavior regarding records, documents, and objects. Omissions can, of
15 course, be intentionally deceptive—as the saying goes, “a lie of omission
16 is still a lie.”

17 2015 WL 737649 at *6. And “even assuming for the purposes of the analysis that the
18 statute criminalizes omissions without expressly saying so, its scienter requirement
19 keeps it from being vague.” Id. (“Specifically, it requires that the individual commit
20 the omission ‘knowingly’ and ‘with the intent to impede, obstruct, or influence the
21 investigation or proper administration of any matter within the jurisdiction of any
22 department or agency of the United States.’”).

23 Finally, Azano’s complaint about the companies is a factual dispute about the
24 true source of the funds, and not the result of any vagueness in the plain language of
25 the statute. Mot. [112] at 27; Boren, 278 F.3d at 914; see also United States v. Sisson,
26 399 U.S. 267, 288 (1970) (a question of evidence is not a question about the
27 sufficiency of the indictment); Rowland, 2014 WL 3341690 at *6 (where campaign
28

1 consultant was charged with false statements in a campaign document designed to
2 hide his role in the campaign, claim that the document contained no false statement
3 was a defense for trial, not a basis to attack the indictment). Accordingly, he may not
4 dress the factual claim as a constitutional vagueness challenge to seek dismissal. The
5 motions should be denied.
6

7 **F. There Is No Error in Instruction to the Grand Jury**

8
9 Azano's final contention is a derivative challenge based on the complaints
10 above. Azano contends that the grand jury was mis-instructed because (1) local
11 elections are not matters within federal jurisdiction; and (2) the conspiracy charge
12 necessarily incorporated a defective understanding of the federal government's
13 jurisdiction on the 1519 offenses. But because the jurisdictional argument lacks merit,
14 as shown above, his challenge, here, too, must be denied.
15
16

17 **IV**

18 **CONCLUSION**

19 For the foregoing reasons, the Court should deny the motions to dismiss
20 Counts 5 through 24.
21

22 DATED: July 3, 2015

Respectfully submitted,

23 s/ William P. Cole
24 s/ Andrew G. Schopler
25 s/ Helen H. Hong
26 WILLIAM P. COLE
27 Acting United States Attorney
28 ANDREW G. SCHOPLER
HELEN H. HONG
Assistant United States Attorney

1 **UNITED STATES DISTRICT COURT**
2 **SOUTHERN DISTRICT OF CALIFORNIA**

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5
6 v.

7 JOSE SUSUMO AZANO MATSURA (1),

8 Defendant.
9

Case No.: 14CR0388-MMA

CERTIFICATE OF SERVICE

10 IT IS HEREBY CERTIFIED THAT:

11 I, William P. Cole, am a citizen of the United States and am at least eighteen
12 years of age. My business address is 880 Front Street, Room 6293, San Diego,
13 California 92101-8893.

14 I am not a party to the above-entitled action. I have caused service of the
15 foregoing brief on the parties by electronically filing the foregoing with the Clerk of
16 the District Court using its ECF System.

17 I declare under penalty of perjury that the foregoing is true and correct.
18 Executed on July 3, 2015
19

20 s/ William P. Cole

21 WILLIAM P. COLE
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